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### Regula Ludi, *Die Fabrikation des Verbrechens. Zur Geschichte der modernen Kriminalpolitik 1750-1850*

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(Frühneuzeit-Forschungen 5)

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# Comptes rendus Reviews

**Regula Ludi, *Die Fabrikation des Verbrechens. Zur Geschichte der modernen Kriminalpolitik 1750-1850*. Tübingen, Bibliotheca academica, 1999, 611 p., ISBN 3-928471-19-8 (Frühneuzeit-Forschungen 5)**

Regula Ludi pursues the ambitious plan to unearth the roots of modern criminal policy in the philosophical, political, and legal discussions of the eighteenth century and to follow the implementation of the new policy during the first half of the nineteenth century. She focuses primarily on the Swiss case(s) of Bern, Zurich, and Aargau. This provides her with the empirical basis to successfully place the history of Swiss criminal policy and penal law in the context of an international debate involving an interested, educated public, and of the cantonal governments' desire to develop an efficient response to security problems. Ludi reconstructs the new criminal policy as being based on the reliable working of an institutional legal apparatus, inflicting just, equal, and predictable punishment on all offenders, and, finally, on the preference given to the prevention of crime through an interventionist approach to socially and morally defined problem groups.

She convincingly argues that the new criminal policy emerges from a utopian liberal project which promises a society free of deviance. Carrying the analysis to the mid-nineteenth century enables her to trace the political, public, and legal debates commenting on the implementation of this utopian idea. She identifies the many disguises in which the new penal policy appeared. It could be part of a conservative, restorative political program, or used as a pillar to build a new, liberal state. In the liberal state, the new criminal paradigm faced two main challenges, as Ludi argues: the first regarded the imminent tension between personal freedom and the security of both state and citizens, as the strong focus on prevention of crime called for a proactive, interventionist policy. The second resulted from the imbalance between the expectations related to the utopian character of the new criminal policy and the demand for an efficient legal and police apparatus, which produced deviance – or at least high conviction rates. The increasing crime rates or even the belief in the existence of security problems challenged the promises connected with the new policy, throwing the credibility of the government into question.

Ludi divides her intriguing narrative into three parts. The first part describes the challenges to and the final demise of a traditional penal policy based on torture and the public staging of executions. In this part, the emergence of a new criminal policy is traced through the «thought experiments» (Isabel Hull) of an enlightened public commenting on the deficiencies of the judicial apparatus of the *Ancien Régime*. The second part follows the implementation of the new paradigm in the Helvetic

Republic and, after its collapse in 1803, in the cantons of Bern, Zurich, and Aargau. The third part takes an even closer look at the Swiss case and focuses on the administration of justice in the canton of Bern during the first half of the nineteenth century.

Ludi's book offers a very thoughtful reconstruction of legal discourse and penal practice. In the first part of the book, her analysis of the prize essays sent in for the *Prix de Berne* (a prize advertised by the Economic Society of Bern for the best essays on criminal policy) deserves special attention for several reasons. Firstly, it further enhances our understanding of the strong preoccupation of the enlightened public with penal law and administration of justice. Secondly, this part of her argument demonstrates the transnational character of the penal discourse and the role of Swiss intellectuals, who are introduced as an important node within this discursive network and as the first promoters of Beccaria north of the Alps (158ff). At the same time, the progressive Swiss intellectuals are presented as living within an anachronistic political and institutional system, characterized by the absence of any codification of penal and procedural laws and even the lack of judges legally trained in the administration of justice. Thirdly, the wide range of solutions proposed in the prize essays for overcoming the dilemma of the existing penal policy emerge in Ludi's analysis as important thought experiments in which the main lines of the penal discourse and criminal policy of the nineteenth century are already put on the table. The essays focussed on the definition of crime and the corresponding punishment, on the legitimization of the state's penal power, and on criminological debates regarding the causes of crimes. The proposed solutions differed, depending on the position of the author within the political spectrum of the late eighteenth century, as Ludi shows. This difference was strongly articulated in the authors' responses to the procedural questions of the *Prix de Berne*. The continuation of torture was part of the conservatives' arsenal in the fight against crime, while the liberals emphasized the need for oral and public hearings. It is typical of Ludi's differentiated analysis of the complex enlightened discourse on penal policies that she does not coerce the various arguments into the narrow constraints of political programs. She also succeeds in understanding the contradictions within the arguments of liberals and social reformers, where a critical stance towards the existing order coexisted with the demands for an interventionist, even repressive approach aiming at social and moral reform.

In the second and third parts of her book, Ludi looks at the implementation of the new criminal policy at the level of cantonal policy-making and the working of the judicial apparatus. She follows two main lines of argumentation. The first reveals the genuine contradictions within liberal criminal policy. Even the main pillar of the liberal program, the respect for personal liberty, turned out to be subjected to the defense of the political and social order. This is shown with reference to the Helvetic Republic and to liberal Swiss cantonal governments of the 1830s and 1840s. Penal-reform projects of the Helvetic Republic aimed at the establishment of a criminal-justice system based on respect for personal liberty. In practice, the need to defend the republic against internal enemies and to guarantee property rights was used to suspend the individual rights of suspects in criminal procedures. This part of the argument clearly shows the subtlety of Ludi's argumentation. She avoids an exclusively political and economic point of view, and looks also at the implications of a peculiar anthropological concept held by liberal reformers. The latter took a rather skeptical attitude towards the reasoning and intellectual capacities of common people, which were deemed insufficient for the commoners' active participation in

public affairs. As Ludi argues, throughout the first half of the nineteenth-century, contemporary commentators could draw a wide range of conclusions from this observation. They could use it as an argument against the introduction of a jury court system (259) as well as for a paternalistic, interventionist approach to moral reform, in which the common people would be introduced to the moral and ethical foundations of modern state and society (456).

The second line of argument reveals the surprising extent to which the restoration of the «old» criminal-law system was possible after the demise of the Helvetic Republic. Some of the Swiss cantons reintroduced the *Carolina* at the beginning of the nineteenth century, while the canton of Zurich abandoned every penal code and returned to jurisdiction which was based exclusively on tradition and the discretion of judges without any formal legal training (325ff). Regarding the criminal procedure, Zurich's return to the practices of the *ancien régime* also implied the reintroduction of torture to extract confessions from suspects (326).

Ludi's book offers many insights into the political and legal approaches to the definition and implementation of a new criminal policy. She casts a wide net in order to capture the polyphonic and multi-layered discourse of the late eighteenth and early nineteenth century as accurately as possible. The reader is therefore introduced to a well-informed legal history of codification plans in different cantons, to political and public debates on crime and the criminal law system, as well as to the increasing importance of 'experts' to provide legal solutions or statistical information for the reform program. Her definition of 'experts' and 'scientific' remains, however, too closely linked to our own understanding to fully acknowledge the importance of practitioners' contributions to an early form of criminological writing. Finally, Ludi's subtle analysis of metaphors of war and disease as a legitimization of repressive penal policy measures within the liberal program is impressive.

In conclusion, I would like to stress again that Ludi has succeeded in presenting a well-researched and -argued history of Swiss criminal law and criminal policy between the mid-eighteenth and the mid-nineteenth centuries. She continually strives to position the Swiss case(s) within the European history of crime, punishment, and the administration of justice. Nevertheless, considering the particularities of the Swiss development, the question remains as to what kind of general conclusions about the history of modern criminal policy can be drawn from this rather peculiar historical case.

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**Herman FRANKE, *The Emancipation of Prisoners. A Socio-Historical Analysis of the Dutch Prison Experience*, Edinburgh, Edinburgh University Press, 1995, 365 p., ISBN 0-7486-0614-9.**

Abstraction faite de ses aspects polémiques sur lesquels nous allons revenir, Herman Franke présente utilement les prisons des Pays-Bas, dans la longue durée, de la fin du XVIII<sup>ème</sup> à nos jours. La problématique de cette socio-histoire est l'étude de l'évolution du traitement concret des prisonniers, de leurs droits et de leur